RHB BANK BHD

v.

DATUK KERAMAT HOLDINGS BHD

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[SUIT NO: D1-22-1128-2002]
1 JULY 2004
[2004] CLJ (JT4)

CIVIL PROCEDURE: *Execution - Stay - Merits of appeal - Whether a relevant consideration - Principles applicable - Special circumstances - Nugatoriness of appeal, whether a special circumstance in itself - Whether special circumstances relate to enforcement/execution of judgment or to merits of appeal - Whether arguable merits of appeal integral in determining existence of special circumstances - Decision of Federal Court in Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd - Whether needs to be revisited*

CIVIL PROCEDURE: *Summary judgment - Appeal against - Principles applicable - Triable issues - Prima facie plausibility - Some other reason meriting a trial*

This was an appeal from the decision of the senior assistant registrar allowing the plaintiff/bank's application for summary judgment for the sum of RM23,253,156.17 (capital sum and interest). The two principal issues that fell for determination before the learned judge centred on: (i) the guidelines in deciding an application for summary judgment; and, more importantly, (ii) the principles in determining an application for a stay of execution, in particular, the 'special circumstances' and 'nugatory' tests and the relevance of the 'merits of the appeal' in relation thereto.

Held:

[1] The defendant here had failed to raise any triable issues in relation to the plaintiff's claim for the principal sum of RM22 million. The three guiding principles in deciding a summary judgment application are: (i) the court must be satisfied, on affidavit evidence, that the defence has not only raised an issue, but that the issue is triable; (ii) the court is not bound to accept, uncritically, every dispute of fact raised by the defence; it has a duty to examine whether the conflict of evidence upon a relevant fact has sufficient *prima facie* plausibility to merit a further

investigation by way of a trial as to its truth; and (iii) whether there is 'some other reason' that merits a trial on the whole claim. (pp 650 e-f & 657 c-d)

[2] The Federal Court had decided, in *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1 ('Kosma'), that "the merits of a party's case in a stay application is not a relevant matter for consideration" and that "if it has been shown that an appeal would be rendered nugatory if stay was refused, what it means is that a special circumstance has been established". (pp 658 f-h & 659 a)

[2a] The genesis of the above ratio in Kosma would appear to be a passage in the judgment of Lord Denning MR in *TC Trustees Ltd v. JS Darwen* [1969] 2 QB 295 ('TC Trustees') in which his Lordship advanced the view that special circumstances are circumstances which go to the enforcement of the judgment and not those which go to its validity or correctness. This view of Lord Denning MR in *TC Trustees* was clearly good law in the context of the factual matrix of that case which exclusively concerned the writ of execution *fieri facias*. The essence of that decision was that it was too late in the day for the defendant there to raise a plea of equitable defence by way of an application under O. 47 r. 1 RSC for stay in a writ of *fi fa*. This statement of law, though wholly pertinent to that case, should not be invoked to apply to a common law (not O. 45 r. 11 RHC) stay of execution proceeding such as was dealt with in Kosma. It could, therefore, be readily concluded from the foregoing that *TC Trustees* is no authority for the proposition in Kosma that arguable merits of the appeal is not a factor for consideration in determining special circumstances. (pp 660 d-h, 661 a-h, 662 a-h & 663 a-b)

[3] As the ratio in Kosma is binding on all courts except the Federal Court, Kosma may have to be revisited by another panel of the Federal Court with a view to reinstating that part of the ratio in *Serangoon Garden Estate Ltd v. Ang Keng* [1953] 19 MLJ 116 ('Serangoon Garden') which held that arguable merits of an applicant's appeal is a factor to be considered in determining special circumstances. (p 665 f-h)

[4] There is always enough material in the form of cause papers (even without a written judgment) before the court hearing the stay application to decide, on a *prima facie* basis, whether there are arguable merits in the appeal or in each party's case. This is similar to the task undertaken by a judge or SAR in a summary application to determine on a *prima facie* basis whether there are triable issues in the claim or defence based on the cause papers. (pp 666 g-h & 667 a)

[5] The view that merits of the appeal is wholly irrelevant would bring about the undesirable situation of a double-edged sword, where if a stay-applicant's appeal is truly grounded upon strong grounds he would be shut out from ventilating them, whereas if his appeal is hopelessly doomed to fail the respondent would also be debarred from raising even a whimper as regards such merits. If it be the former position the cause of justice is defeated, and if the latter, the court's judicial time is wasted. The latter position would result in a mounting backlog of appeals in the courts, particularly in the Court of Appeal, and the fruits of litigation would be unjustly withheld from the respondent for a considerable period of time. (pp 666 h & 667 a)

[6] On the nugatory point, besides bare assertions, the defendant did not condescend upon any particulars as to how it could not be restored to its original position if it succeeded in its appeal. The reason was obvious. The plaintiff is a reputable bank with sound financial backing. As no other grounds that would constitute special circumstances for a stay was canvassed by counsel for the defendant, the application had to be dismissed. (pp 667 g & 668 f)

[Defendant's appeal in relation to plaintiff's claim for principal sum dismissed; stay of execution refused.]

Case(s) referred to:

Alexander v. Cambridge Credit Corporation Ltd [1985] 10 ACLR 42 ***(refd)***
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 FC ***(refd)***
Atkins v. GW Ry [1886] 2 TR 400 ***(refd)***
Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***
Deputy Commissioner of Taxation (Vic) v. Trevaskis [1984] ATR 867 ***(refd)***
Deputy Federal Commissioner of Taxation v. Brewer [1987] ATC 4560 ***(refd)***
Dickdon Trading (S) Pte Ltd v. Transmarco Ltd [1989] 2 MLJ 408 ***(refd)***
Eng Mee Yong & Ors v. V Letchumanan [1979] 2 MLJ 212 ***(refd)***
Gek Lau Choon Theatrical Company v. Hu Kiang Yan [1937] MLJ 25 ***(refd)***
Jaya Harta Realty Sdn Bhd v. Koperasi Kemajuan Pekerja-pekerja Ladang Bhd; Tetuan Isharidah, Ho, Chong & Menon (Garnishee) [2000] 3 CLJ 361 HC ***(refd)***
Kamaraguru N Muniandi & Ors v. PP [1994] 2 CLJ 53 HC ***(refd)***
Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Private Ltd [1983] 2 CLJ 187; [1983] CLJ (Rep) 186 FC ***(refd)***
Kerajaan Malaysia v. Dato' Hj Ghani Gilong [1995] 3 CLJ 161 FC ***(refd)***
Kerajaan Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 FC ***(refd)***
Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

Lim Kok Liam & Song Sdn Bhd v. Tan Choon Wan [1996] 4 CLJ 256 HC ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng [1995] 2 CLJ 713 CA ***(refd)***
Monk v. Bartram [1891] 1 QB 346 ***(refd)***
PP v. Goh Kim Looi [1994] 2 CLJ 809 HC ***(refd)***
PP v. Ong Cheng Heong [1998] 4 CLJ 209 HC ***(refd)***
PP v. Saare Hama & Anor [2001] 4 CLJ 475 HC ***(refd)***
Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2) [1976] 1 MLJ 131 ***(refd)***
See Teow guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 CA ***(refd)***
Serangoon Garden Estate Ltd v. Ang Keng [1953] 19 MLJ 116 ***(refd)***
Tan Boon Kean v. PP [1995] 4 CLJ 456 FC ***(refd)***
Tan Swee Hoe & Co v. Ali Hussain Bro [1980] MLJ 16 ***(refd)***
TC Trustees Ltd v. JS Darwen [1969] 2 QB 295 ***(refd)***
Tsen Kyun Tshin v. Lee Tse Khiong [1998] 3 CLJ 148 HC ***(refd)***
Yun Hing (Sabah) Sdn Bhd v. Sandakan Plywood & Veneers Co Sdn Bhd [1995] 2 CLJ 665 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 68
Criminal Procedure Code, s. 180
Evidence Act 1950, s. 91, 92, 93, 94, 95, 96, 97, 98, 99
Rules of the High Court 1980, O. 45 r. 11, O. 47 r. 1

Rules of the Supreme Court [Eng], O. 47 r. 1

For the appellant/defendant - Norasma Che Din; M/s Murthi & Partners
For the defendant - V Sithambaram (Mohd Haaziq); M/s Sitham & Assoc
For the respondent/plaintiff - KA Gan (KS Thuang); M/s Lee Hishammuddin

Reported by Gan Peng Chiang

JUDGMENT

Vincent Ng J:

Preamble

Enclosure 20 before me is the defendant's appeal against the learned senior assistant registrar's (SAR) decision dated 20 June 2003, allowing the plaintiff's application for summary judgment.

Judgment was recorded against the defendant for the sum of RM23,253,156.17 as at 30 April 2002 inclusive of interest, with further interest thereon at 3.5% per annum above the plaintiff's Base Lending Rate from 1 May 2002 to date of full settlement and costs.

The Background Facts

The facts of the plaintiff's case are straightforward. Between August 1996 and June 1997, the plaintiff granted the defendant three revolving credit facilities amounting to RM150 million called 'RCF1', 'RCF2' and 'RCF3'. In January 2000, at the defendant's request, the parties renegotiated the terms of all three revolving credit facilities. The defendant authorized the plaintiff to utilize the funds in the defendant's three fixed deposit account nos. 'FD1, 'FD2' and 'FD3' to set off the interest and part of the principal sum due under the three credit facilities. The outstanding balance of RM22 million was then restructured, as confirmed by and subject to the terms and conditions contained in the plaintiff's letter dated 26 January 2000 (exh. A5 encl. 7), which resulted in a single revolving credit facility 'RCF4'.

The new terms and conditions of the restructured credit facility was approved and validated by the defendant through the Directors' Circular Resolution passed on 2 May 2000 (exh. A7 encl. 7).

Upon the defendant's failure to service the restructured credit facility 'RCF4', the plaintiff, *vide* letter dated 13 May 2002, terminated the same and demanded payment of all sums outstanding (exh. A9 encl. 7).

The Guiding Principles

The three guiding principles in deciding a summary judgment application are:

(i) the court must be satisfied on affidavit evidence that the defence has not only raised an issue, but also that the issue is triable;

(ii) the court is not bound to accept uncritically every dispute of fact raised by the defence. The court has a duty to examine whether the conflict of evidence upon a relevant fact has sufficient prima facie plausibility to merit a further investigation by way of a trial as to its truth;

(iii) whether there is 'some other reason' that merited trial on the whole claim.

(See *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC and *Eng Mee Yong & Ors v. V. Letchumanan* [1979] 2 MLJ 212 PC.)

Guided by these well settled propositions of law, I perused all five affidavits affirmed by both parties.

The First Issue

The defendant alleged that they were induced into accepting the restructured credit facility 'RCF4' by the oral representations made by the plaintiff. According to the defendant, the plaintiff had promised to use the funds in the defendant's fixed deposit account numbers RCF1, RCF2 and RCF3 only as

security for the restructured credit facility 'RCF4' and to charge only 1% interest differential between the fixed deposit account and the plaintiff's Costs of Fund. These oral promises, the defendant submitted, created a collateral contract between the parties and the existence of this oral contract merited a trial. As authority, the defendant cited *Tan Swee Hoe & Co v. Ali Hussain Bro* [1980] MLJ 16 wherein Raja Azlan Shah J (as His Royal Highness then was) held that:

> … The device of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imported into the main agreement. Instead it constitutes a separate contract which exists side by side with the main agreement.

I find that this issue is devoid of any merit for a myriad of reasons. Despite alleging that there was a collateral contract, the defendant have not only been strangely silent on the particulars of the said oral contract but have also failed to adduce any evidence to substantiate their allegation. In fact, the inherent improbability of the defendant's allegation becomes apparent in the face of the formal contemporaneous documents exhibited by the plaintiff (exhs. A1 – A4 encl. 7). I am completely ad idem with the judgment of McElwaine J in *Gek Lau Choon Theatrical Company v. Hu Kiang Yan* [1937] MLJ 25 at 26 that:

> … the more formal the written document is, the more suspicious the Court must be as to the existence of a collateral contract, …

Furthermore, the terms that the defendant have now alleged that the parties had agreed to orally are in stark contrast to the terms set out in exhs. A1-A3 & A5 encl. 7. These terms were expressly and unconditionally accepted by the defendant, as evidenced in exh. A4 of encl. 7, and in the absence of any contemporaneous protest at the time the credit facility was restructured, the defendant's allegation amounts to nothing more than a mere sham.

Exhibit A 4 reads as follows:

> DATUK KERAMAT HOLDINGS BERHAD (19667X)
> (Incorporated in Malaysia)
>
> EXTRACT of the Directors' Circular Resolution of the above Company passed on 12 May 1997
>
> DCB BANK BERHAD
> ADDITIONAL REVOLVING CREDIT FACILITY OF RM80.0 MILLION, WHICH TOGETHER WITH THE EXISTING LIMIT OF RM70.0 MILLION, MAKES A TOTAL LIMIT OF RM150.0 MILLION

a. THAT the Company be and is hereby authorised to accept the following additional revolving credit facility of RM80.0 million offered by DCB Bank Berhad of Kuala Lumpur Main Branch, DCB 1, RHB Centre, 426 Jalan Tun Razak, 50400 Kuala Lumpur ("DCB") subject to the terms and conditions as stipulated in DCB's letter of offer dated 2 June 1997 (a copy of which is attached hereto):

Facility	Existing Limit RM	Additional Limit (RM)	Total Limit (RM)
Revolving Credit I	20,000,000	-	20,000,000
Revolving Credit II	50,000,000	-	50,000,000
Revolving Credit III	-	80,000,000	80,000,000
	70,000,000	80,000,000	150,000,000

b. THAT any one (1) of the Directors of the Company be and is hereby authorised to:

c.

(i) signify the Company's acceptance of DCB's offer by signing on the original copy of the said letter of offer for and on behalf of the Company and to return the same to DCB together with a certified copy of this resolution.

(ii) signify the Company's acceptance of any revision of the terms and conditions of the Facility and renewals of the Facility from time to time.

d. THAT the Common Seal of the Company be and is hereby authorised to be affixed onto the relevant documents pertaining to the above credit facility, if necessary, in accordance with the provisions of the Company's Articles of Association.

e. THAT any two of the following persons be authorised to sign on behalf of the Company all documents relating to the drawdown under the facility to be credited into the Company's current account maintained with any bank, any notices required to be given by the Company and otherwise to act on the Company's behalf on any matters in relation to the said facilities:

Dato' Mohd Noor bin Yusof
Encik Azimuddin bin Ab. Ghani
Encik Pawanteh bin Yusoff
Dato' Wong Peng Long
Madam Tan Yok Wa

Mr Lee Ming Yuet
Encik Razalli Shamsuddin
Mr Wee Hoe Soon @ Gooi Hoe Soon

The specimen signatures of the persons so authorised is annexed hereto.

f. THAT a certified copy of these resolutions be furnished to the Bank, and shall remain in force until the receipt of the said Bank of a certified copy of an amending resolution be passed by the Board of Directors.

Certified True Copy

Sgd.
…
Director

Sgd.
…
Director/Secretary

Dated this 12 Jun 1997
Kuala Lumpur

It is trite law that when the terms of a contract have been reduced in writing to a formal document, and the terms of the contract have been proved by way of the document itself under s. 91 of the Evidence Act 1950 ('the Act'), then, save in exceptional circumstances, no oral evidence could be led for the purpose of contradicting or varying the terms of the contract. The defendant's attempts to do so offend the provisions of the Act.

I find the existence of the Collateral Agreement to be inherently improbable. My reasons are twofold.

(a) If the Collateral Agreement does exist as alleged by the defendant, it is devoid of common sense and implausible for the defendant to sign and accept unconditionally the terms and conditions including interest chargeable as stipulated in 'RCF1', 'RCF2' and 'RCF3' which is in stark contrast with the alleged Collateral Agreement.

(b) Further, the fact that the defendant had not disputed the rate of interest when the restructuring was done and when 'RCF4' was granted to them, must be taken as to conclude that the defendant was at all the material times aware of and had agreed to the rate of interest imposed under 'RCF1', 'RCF2' and 'RCF3'. This clearly shows the non existence of any Collateral Agreement.

Notwithstanding my above views, and bearing in mind trite law, I would hold that the terms allegedly agreed to orally in earlier negotiations between the parties, even if true (not so in the instant case), had become wholly irrelevant

as soon as the parties accepted the terms of the new restructured revolving credit facility RCF4. I am reminded of the Federal Court decision pertaining to ss. 91 to 99 of the Evidence Act 1950 in *Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Private Ltd* [1983] 2 CLJ 187; [1983] CLJ (Rep) 186 which sets out the law – pertaining to whether pre-contract negotiations could be looked at in aid of construction of a written document – in the following language:

> For the construction of a written agreement the established doctrine is firstly to exclude evidence of negotiations leading up to the contract on the ground that it is only the final agreement which records a consensus and as such evidence of negotiations is unhelpful; and secondly to exclude evidence of the parties' subjective intentions so that any individual purpose which either of them hopes to achieve by the agreement and their own interpretation and understanding of the agreement is not admissible.

The Second Issue

The defendant alleged that the plaintiff unilaterally restructured the three credit facilities by uplifting the defendant's three fixed deposit nos. FD1, FD2 and FD3 to set off the monies due and thereby creating a new credit facility 'RCF4'. They maintained that they never accepted the terms of the new restructured credit facility 'RCF4', and they pointed to the plaintiff's own documents which show that the new restructured credit facility was accepted by another legal entity, DKH Management (exh. A6, p. 37 encl. 7).

This issue took both the plaintiff and this court by surprise as it was never raised in any of the defendant's affidavits, thereby depriving the plaintiff of any opportunity to refute the same. In *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng* [1995] 2 CLJ 713, Gopal Sri Ram JCA, delivering the judgment of the Court of Appeal dealt with this very issue and held that to allow a party to raise a point in such circumstances would be tantamount to a deprivation of essential justice to the other side.

In any event, the defendant's allegation was doomed to failure merely by the opening words of the plaintiff's letter of offer dated 21 January 2000 addressed to the defendant (exh. A6 encl. 7) and the closing words of the defendant's Directors' Circular Resolution passed on 2 May 2000 (exh. A7 encl. 7). The opening words of the plaintiff's said letter are as follows:

> We refer to your letter of January 11, 2000 and the discussion of January 14, 2000.
>
> Please be advised that RHB Bank Berhad is agreeable to your request to uplift the Fixed Deposits (FDs) placed with us to settle the outstanding facilities. …

whilst the defendant's circular resolution (exh. A7) in which the closing words appear reads:

DATUK KERAMAT HOLDINGS BERHAD (19667X)
(Incorporated in Malaysia)

EXTRACT of Directors' Circular Resolution of the above Company passed on 2 May 2000

REVISED BANKING FACILITY - RHB BANK BERHAD

THAT the Company do hereby approve and validate and retrospectively ratify the acceptance of the following unsecured revised banking facility ("the Facility") offered by RHB Bank Berhad of Tower Two & Three, RHB Centre, Jalan Tun Razak, 50400 Kuala Lumpur ("the Bank') on the terms and conditions as stipulated in the Bank's letter dated 26 January 2000:

Facility	Limit	Reduction	New Limit
Revolving Credit Facility	RM150.0 million	RM128.0 million*	RM22.0 million

* The RM128.0 million has been settled on 21 January 2000 **upon the Company's request**. (emphasis added)

Certified True Copy

Sgd.
…
Director

Sgd.
…
Director/Secretary

Dated this 2 May 2000

Thus, as there was no rebuttal by the defendant to any of the above assertions in the plaintiff's letter of offer dated 21 January 2000 (to uplift the three fixed deposit accounts FD1, FD2 and FD3 towards settling the outstanding three revolving credit facilities 'RCF1', 'RCF2' and 'RCF3'), it cannot, upon contemporaneous documents, be denied – and indeed the defendant is estopped from denying – that they had accepted the terms of the new restructured revolving credit facility RCF4. Indeed, a fortiori, such acceptance of the terms was not only undisputed but was ratified or confirmed by the said circular resolution dated 2 May 2000 that was passed by the defendant company.

The 'Some Other Reason'

For all the reasons set out above, but to the extent only of the capital sum of RM22,000,000 claimed by the plaintiff, this court could not find any factor in favour of the defendant under the 'some other reason' consideration.

The defendant also disputed the interest claimed by the plaintiff, alleging that the plaintiff reduced the interest rates on the defendant's fixed deposit and increased the interest rates on the credit facilities. And that this resulted in the defendant over paying the plaintiff, which sets the foundation for the defendant's counterclaim.

As mentioned earlier the plaintiff's claim was based on the restructured credit facility RCF4 as per letter dated 26 January 2000 (exh. A5 encl. 7). The relevant terms on the revolving credit facility RCF4 are reproduced below for ease of reference.

> III. **INTEREST RATE/BANKING CHARGES/ OTHER CHARGES/ VARIATION OF INTEREST.**
>
> (1) … Without prejudice to the generality of the foregoing interest payable by you in respect of the banking Facility shall be:-
>
> **Revolving Credit Facility**
>
> *2.0% over our prevailing Cost of Funds together with the costs of liquidity and statutory requirements* for the like period. …
>
> *The Bank shall be entitled at any time at its sole and absolute discretion by notice to you … to change the fundamental basis of calculation of the prescribed rate …*
>
> **(2) Variation of Interest**
>
> *The Bank shall also be entitled at its sole and absolute discretion at any time and from time to time to vary the Bank's Margin of Interest imposed above the Bank's Cost of Funds by serving a notice in writing on you* of such change in rates … (emphasis added).

It is common ground that the plaintiff have varied their margin of interest from 3% to 3.5% per annum and changed their fundamental basis of calculation of the bank's margin of interest imposed above the bank's costs of funds. Though clearly, under the above set out agreed terms of the restructured credit facility (cl. III & cl. IX (5) exh. A5 encl. 7), the plaintiff are entitled at their sole and absolute discretion to do so, yet nevertheless the plaintiff have failed to adduce any evidence to show that the defendant was given notice of this variation of the margin of interest as required under the aforesaid terms. Most importantly, oral evidence is, in my considered judgment, called for to enlighten the court on the fundamental basis of calculation of and the import of the

expression **"Bank's Margin of Interest imposed above the Bank's Cost of Funds"** (emphasis added). Not even affidavit evidence was forthcoming on this score, which calls into question the correctness of the basis of computation of the interest claimed. I am of the opinion that this is a triable issue. In my view, it would be imprudent to use such esoteric terms as 'the bank's cost of funds' (as opposed to a certain percentage above BLR) in any loan agreement as this may impede a bank's attempt to secure the interest part of the claim in a summary O. 14 application; though it may pose no problem so to secure after a full trial.

Conclusion

After careful consideration of the pleadings, the affidavits and the submissions put in by both sides, I am satisfied that the defendant have failed to raise any triable issues in relation to the plaintiff's claim for the principal sum of RM22 million. The learned SAR's decision is thus confirmed to this extent. However, I hold that the plaintiff's claim for the interest on the capital sum merits further investigation by way of a trial. In the event, the defendant's appeal in encl. 20 is allowed in part only, and the learned SAR's order is accordingly varied to allow judgment to be entered against the defendant on only the principal sum of RM22 million with costs.

The Application For Stay

The Law

Shortly following my above decision confirming the summary judgment, the defendants applied for stay of execution. In recent months I have encountered an unusually high number of stay applications coupled with appeals to the Court of Appeal. I could not fathom the reason for this, as I was quite happy when I was informed that the law on stay of execution has finally been settled, with the restoration of the special circumstances approach, by our apex court in *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1 *(Kosma)*. I had assumed that the principles for stay of execution as set out in *Serangoon Garden Estate Ltd v. Ang Keng* [1953] 19 MLJ 116 *(Serangoon Garden)* had been finally reinstated. I had occasion in *Jaya Harta Realty Sdn Bhd v. Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd; Tetuan Isharidah, Ho, Chong & Menon (Garnishee)* [2000] 3 CLJ 361 *(Jaya Harta)* to express my grave reservations on the pronouncement in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299 *(See Teow Guan)* that the ratio in Serangoon Garden was bad law. My views in Jaya Harta were expressed in the following language (at p. 368 at (e)):

> The terms in which the court's jurisdiction is conferred on stay of execution pending an appeal are general and unlimited. How the judicial discretion conferred by that jurisdiction should be exercised must be guided by proper rules founded on principle.

And (at p. 369 at (b):

> … In order not to impose a fetter on the exercise of the court's discretion whether to grant a stay of execution, myriad and various factors constituting special circumstances have been recognised by the courts in Commonwealth jurisdictions, and 'how pertinent that factor would be may vary according to the circumstances of each particular case' per Abdul Hamid J (as he then was) in *Mohd Mustafa v. Kandasami (No. 2)* Federal Court [1979] 2 MLJ 126.

See Teow Guan was a Court of Appeal decision which went against the trite principles on stay of execution, well established by the Federal Court in cases such as *Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No. 2)* [1976] 1 MLJ 131; *Kerajaan Malaysia v. Jasanusa Sdn Bhd* [1995] 2 CLJ 701 and *Kerajaan Malaysia v. Dato' Hj Ghani Gilong* [1995] 3 CLJ 161. The Court of Appeal in *See Teow Guan* did not consider itself bound by the ratio in the three aforesaid Federal Court decisions presumably because the decisions hailed from the then two tier superior-court system.

I only realised I was mistaken when counsel for the applicant for stay in an earlier matter before me made an astounding submission that due to the presence of the nugatory factor as the sole ingredient, the applicant is clothed with special circumstances even if he is unable to show, upon a *prima facie* basis, any arguable merits in his appeal to the Court of Appeal. In other words, the ingredient of arguable merits is not a factor to be considered, even on a *prima facie* basis, in determining special circumstances. In support of this contention, counsel quoted the following passage from the judgment in *Kosma* (at (f) p. 16): "Having expressed my views on the law I shall now consider the motion. Both parties delved into some length on the merits of their respective case in the affidavits filed and the submission made in court. The merits of a party's case in a stay application is not a relevant matter for consideration."; and, (further down at (f) p. 17): "It is therefore unnecessary for me to consider the merits of the respective case of the applicants and respondents. The onus is on the applicants to demonstrate the existence of special circumstances to justify the grant of a stay of execution. **The reasons must relate to the enforcement of the judgment.**" (emphasis added)

From the above passages, the general tenor and drift of the judgment and the Federal Court's acceptance of the views of the *Judicial Commissioner in Dickson Trading (S) Pte Ltd v. Transmarco Ltd* [1989] 2 MLJ 408 *(Dickson Trading)* pertaining to merits in the appeal, it would appear that counsel for the applicant did not misapprehend the *ratio decidendi* in *Kosma* in contending that no arguable merits, even upon a *prima facie* basis, need to be shown in their application for stay. On the general tenor and drift of the judgment I am mindful of the following passage (at (c) p. 16) in the judgment in *Kosma*:

> In other words special circumstances is the genus of which nugatoriness is a species. **If it has been shown that an appeal would be rendered nugatory if stay was refused what it means is that a special circumstance has been established**. (emphasis added)

The ratio in *Kosma* that prima facie arguable merits of the appeal need not at all be shown runs counter to the ratio in *Serangoon Garden* where Brown J in setting out the principles for the granting of stay, in his well focussed, well expressed, succinct judgment (a busy law practitioner's abiding wish) pregnant with empirical wisdom, said:

> The learned District Judge had a discretion to grant a stay of execution. And I should not think it right to interfere with the exercise of his discretion if I was satisfied that he had exercised it on correct principles. There is no rule of practice limiting the exercise of his discretion. But it is a clear principle that the Court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can shew special circumstances to justify it. *The only ground, so far as appears in the written grounds for granting this stay, is that if the defendant succeeded in his appeal he could not be restored to the same position as before* because the plaintiffs would have removed his pig-sty. *The ground, standing alone, in my opinion cannot be a sufficient ground on which to grant a stay of execution. It seems to me that to hold otherwise would be to establish a precedent, and in effect to lay down a rule of practice, that in all cases where the defendant cannot be restored to his original position if his appeal succeeds, a successful litigant is to be deprived of the fruits of his litigation until such time as the appeal is determined.* Such a ground might well be an important factor to take into consideration if there were other grounds. *If, for example, another ground had been that there were merits in the appeal, that fact coupled with the fact that the defendant, if successful, could not be restored to his original position might well have afforded special circumstances* to justify the learned District Judge in exercising his discretion to grant a stay; and I should not have thought it right to interfere. (emphasis added)

I am aware of criticism by certain quarters on the briefness of Brown J's judgment in *Serangoon Garden*. My observation is that the ability to write a judgment infused with knowledge of the law is sweat-driven whilst the talent for writing an in-depth analytical judgment replete with practical, empirical wisdom is God-given. The latter class I would call, if you will, 'the Lord Denning class'. The judgment of Brown J in *Serangoon Garden, albeit* short as it is, evinces a standard in the latter class; you either have it or don't, period. Surely, this must be the reason why *Serangoon Garden* has, (until *Dickson Trading* and *See Teow Guan*) quite remarkably withstood scrutiny and held firm for decades as the landmark authority on stay of execution applications. It is unnecessary to indulge in verbose language or voluminous verbiage to display the latter attributes. Indeed, an excessively lengthy judgment tends to

reveal a wandering mind equipped with roaming attributes that are apt for handphones. I am wont to remind lawyers before me that the weakness of their case is often co-extensive with the length of their submission, or rather, the strength of a case is often indicated by the brevity of a well focussed submission.

It is the practical grounding of Brown J's potent observation – that "to hold otherwise would be to establish a precedent, and in effect to lay down a rule of practice, that in all cases where the defendant cannot be restored to his original position if his appeal succeeds, a successful litigant is to be deprived of the fruits of his litigation until such time as the appeal is determined" – which will return to haunt us until the essence (perhaps with some modification) of the ratio in *Serangoon Garden* is restored or resurrected in toto.

The genesis of the ratio in *Kosma* that 'the merits of a party's case in a stay application is not a relevant matter for consideration' would appear to be a passage in the judgment of Lord Denning MR in *T.C. Trustees Ltd v. J.S. Darwen* [1969] 2 QB 295 *(T.C. Trustees)* which reads (at p. 302):

> Mr. Lipfriend raised a further point. He said that under RSC Order 47 r. 1, **there is power, in the case of a writ of fi fa, or elegit, to stay proceedings** if there are special circumstances which render it inexpedient to enforce the judgment or **in case the applicant is unable from any cause to pay the money**. I think that is appropriate here. The circumstances there again are **circumstances which go to the enforcement of the judgment: and not those which go to its validity or correctness**.

In reference to the above passage, it is to be noted that the English Rules of Supreme Court O. 47 r. 1 is in *pari materia* with O. 47 r. 1 of our Rules of the High Court 1980 which states:

> (1) Where a judgment is given or an order made for the payment by any person of money, and the Court is satisfied, on an application made at the time of the judgment or order, or at any time thereafter, by the judgment debtor or other party liable to execution:
>
> (a) that there are special circumstances which render it inexpedient to enforce the judgment or order; or
>
> (b) **that the applicant is unable from any cause to pay the money,**
>
> then, notwithstanding anything in rule 2 or 3, the Court may by order stay the execution of the judgment or order by writ of seizure and sale either absolutely or for such period and subject to such conditions as the Court thinks fit. (emphasis added)

In my opinion, our O. 47 r. 1 is a throwback to the (as you like) "FiFa" era in England, considering that O. 47 r. 1(b) also remarkably, provides as a ground for stay, where "the applicant is unable from any cause to pay the money". Couched in such language it would appear that O. 47 r. 1 is designed for applications to counter a particular species of writ called a Writ of Fieri Facias – also known as Fi.Fa. Writ, which is now obsolete in our jurisdiction. Thus, our O. 47 r. 1 has certainly not kept pace with the times and the present exigencies of our commercial world. It is important to know that a Writ of Fieri Facias is not a writ of summons but a writ of execution addressed to the sheriff and requiring him to seize property of a debtor in order to obtain payment of a judgment debt. It would follow that since a Writ of Fi.Fa. is issued as of right immediately upon payment becoming due and as a matter of course without leave, no question of merits of the appeal could ever arise or could be canvassed. Indeed, any application made under O. 47 r. 1 would essentially have to follow a writ of execution already issued. It is in essence an application to stay, for a period or absolutely, the execution of the existing writ itself on the ground that the applicant is unable to pay the money.

In order to decide whether the words of Denning MR could be applied in a common law or stay application situation we have to carefully study the factual matrix of *T.C. Trustees* so as to avoid the pitfall of quoting and invoking passages from the judgment out of context. I believe the following excepts from the report of the judgment (at p. 299) would assist to determine the true nature of the case in *T.C. Trustees*:

> Where there is a contract whereby a sum of money is to be paid at a future date or on a future event and the date has passed or the event has occurred, so that the money has fallen due, **the court should not intervene by the device of a stay of execution to prevent the realisation of the plaintiff's rights**. If there is to be any relief, it should be relief before judgment. … Provisos (a) and (b) to section 41 of the Act of 1925 only preserve in certain circumstances existing rights. **Once judgment has been given, equities cannot be raised by a back door by a stay of execution.** The circumstances under which a cause of action arose are only material, either in the High Court or a county court, prior to judgment. The merits of the cause are equities in the cause. A creditor is entitled to know the value of his chose in action. This is not the sort of case where discretion should be exercised in favour of a defendant with very substantial balances.
>
> The court has no power to grant a stay in the circumstances of this case beyond the powers given by RSC Order 47 r. 1. There are no special circumstances under r 1(a). The defendants should not be allowed to go on trading on the defendants' loan. (emphasis added)

a It is thus clear that *T.C. Trustees* concern a peculiar application under O. 47 r. 1(1) of the English Rules of Supreme Court (Rev 1965), against the writ of execution FiFa, by the defendants through an application for stay of execution, in which they had sought to 'raise by the back door', certain reliefs against the plaintiff's earlier application for summary judgment in the sum of £45,000 b with interests, which became due and immediately repayable upon default for 21 days by the defendants in the payment of interest due as per the contract. The debt was not disputed by the defendants but they nevertheless prayed to the court for an equitable relief (under the O. 47 r. 1(1) provision) grounded upon the defendants' admitted clerical error in having laboured under the c impression that the interest was due on 30 September 1965 rather than 31 August 1965 – that is, they mistook the date of payment. Upon appeal to the Court of Appeal (where Lord Denning MR, Lord Diplock and Winn LJ formed the corum), it was held, that an application for leave to issue a Writ of Fieri Facias under a judgment debt ought not be regarded as "proceedings in any cause or matter" within proviso (a) to s. 41 of the Supreme Court of Judicature d (Consolidation) Act 1925, and that such equitable relief, if at all available under O. 47 r. 1(1) must "be sought in the action itself before judgment is given" and "it was too late to come after judgment" as "the court should not intervene by a device of a stay of execution to prevent the realisation of the plaintiff's right" (not at all disputed) to the sum of money in pursuance of an agreement e between the parties. Consequently, in *T.C. Trustees*, Lord Denning made the following legally sound observation:

> … The Courts of Equity no longer have any power to grant injunctions against Courts of Common Law. They can themselves grant any form of equitable relief. And they are bound to give effect to every equitable defence. *But this* f *equitable relief must, I think, be sought in the action itself, before judgment is given.* It is too late to come after judgment.
>
> In this very case *the defendants,* in their affidavit under R.S.C., Order 14 *did raise a plea for equitable relief. But it was overruled, and judgment given against the defendants. It is not permissible to renew it again on an* g *application for a stay of execution.*
>
> … It is true that the courts have an inherent jurisdiction to stay proceedings, but only on grounds which are relevant to a stay. *It does not extend to* grounds which are properly *matters of defence of law or relief in equity,* for those must be raised in the action itself.

h The above view of Lord Denning was clearly good law in the context of the factual matrix of that case, which exclusively concern the writ of execution fieri facias. The pith and kernel of what that brilliant judge said was that it is too late in the day for the defendant to raise a plea of equitable defence by i way of an application under O. 47 r. 1 for stay in a Writ of Fi Fa. Surely,

this statement of good law, though wholly pertinent to that case, should not be invoked to apply to a common law (not O. 45 r. 11 RHC) stay of execution proceeding such as was dealt with in *Kosma*. In order words, the ratio established in *T.C. Trustees* was that a defendant should not be allowed to rehash or raise a species of defence in equity (that is only available before execution, in the cause proper) "by a back door, through the vehicle of an application for stay of execution". And so, clearly, it could be readily concluded from the foregoing that *T.C. Trustees* is no authority for the proposition in *Kosma* that arguable merits of the appeal is not a factor for consideration in determining special circumstances. No doubt, it is trite law in stay applications that having arguable merits or even strong merits in the appeal does not by itself constitute special circumstances.

An excerpt from the judgment of Kirby J in *Alexander v. Cambridge Credit Corporation Limited* [1985] 10 ACLR 42 *(Alexander)* was also cited with disapproval in *Kosma*. To be fair to that erudite judge I think it is important to bear in mind that, though his Lordship used the term 'an appropriate case' instead of 'special circumstances' yet nevertheless, quite correctly (in my view) he set out the following three traditional core ingredients that are necessary to demonstrate 'an appropriate case' to warrant a stay (which accords with *Serangoon Garden*), namely:

(i) where 'the balance of convenience' is in favour of the applicant/appellant (see also *A.G. v. Emerson & Ors* ([1889] 24 QBD 56); *Clyne v. Deputy Commissioner of Taxation* ([1982] 56 ALJR 857); and *Andrews & Anor v. John Fairfax & Sons Ltd* ([1979] 2 NSWLR 184);

(ii) where 'it is apparent that unless a stay is granted an appeal will be rendered nugatory …" (see also *Wilson v. Church No. 2* ([1879 12 Ch D 454) and *Scarborough v. Lew's Function Stores Pty Ltd* ((193) VR 129); and

(iii) that the applicant/appellant 'has an arguable' appeal.

Be that as it may, on the point of special circumstances, Kirby J was entirely correct to say that "the legislature has not said so in terms" (notably, he was dealing with a common law stay) when he went on to say that "instead of special circumstances it is sufficient that the applicant for stay demonstrates a reason or an appropriate case to warrant the exercise of the discretion …".

It is also noted that some courts have cited a passage in the case of *Atkins v. G.W. Ry* [1886] 2 TR 400 *(Atkins)* as oblique approval of their views that the merits of the appeal or case is irrelevant. In *Atkins*, Lord Esher MR held that "… but that there were strong grounds for an appeal was no reason, for no one ought to appeal without strong grounds". The words underscored must

surely be so, yet one must not confuse an ideal with a reality and a stance (commonly) taken as opposed to a fact established that there are arguable merits in the appeal.

The irony of it all is that whereas the Singapore case of *Dickson Trading* was invoked in *See Teow Guan* to repudiate the special circumstances test 'as bad law', in *Kosma*, the same Singapore authority was cited with approval by the Federal Court, to buttress its rejection of the necessity to show any arguable merits, as a component of special circumstances. In my view, before we take *Dickson Trading* as persuasive authority it is wise to note that the legal system of Singapore could take, in its stride, such limited approach towards stay, quite unlike Malaysia where the rosy prospects of a long delay in depriving the opponent of the fruits of litigation is a virtual fixation in every litigant's mind, which results in groundless appeals being filed as a matter course.

After a brutally frank analysis of the judgments in *See Teow Guan* and *Kosma* (both judgments no doubt written with a high command of language) I find that in essence, *See Teow Guan*, with its coupling of nugatoriness and merits, would appear to approximate more closely the essential ingredients for stay postulated in *Serangoon Garden* than *Kosma*, bereft of the 'arguable merits' ingredient. The only divergence is that *See Teow Guan* went on to disavow *Serangoon Garden* with the declaration that the "decision (therein) is bad law, and ought no longer be followed by this court", whereas *Kosma* restored 'special circumstances' but advanced the proposition that arguable merits on the appeal is wholly irrelevant and ought not to be addressed at the stay hearing.

Though the presence of strong grounds for the appeal or that the judgment was against the weight of evidence does not by itself constitute special circumstances (see *Monk v. Bartram* [1891] 1 QB 346) yet, it is my view that in order to establish special circumstances, the nugatory ingredient or some other extraordinary circumstances, must be coupled with the presence of arguable merits, made out on a *prima facie* basis, as advanced in *Serangoon Garden.* Surely, in determining whether "an appeal would be rendered nugatory should the applicant succeed in his appeal" it is entirely consistent with sound logic and reasoning that the court requires the applicant to satisfy the court, at least on a *prima facie* basis, that there are arguable merits in his appeal, that is, that there are some prospects of success in his appeal (see also *Lim Kok Liam & Song Sdn Bhd v. Tan Choon Wan* [1996] 4 CLJ 256 and *Tsen Kyun Tshin* [1998] 3 CLJ 148).

We are faced with the phenomenon where decisions are often appealed against irrespective of their merits, driven perhaps by the twin objectives of fees for the lawyer and a substantial delay for the clients, especially if a stay of the decision could be obtained as a matter of course. I am sad to observe that

some lawyers (quite easily identifiable) are prone to cut their moves according to their pockets, ever sensitive to any changes to the court's approach in decision making. The incorrigible habit of litigants filing appeals bereft of any merits, should be curbed by a combination of set rules and sufficiently definitive case authorities. Regretfully, according to certain lawyers, stay of execution has been, in recent months, so liberally granted that they are under the impression that ordinary circumstances rather than special circumstances test seem to prevail in the courts. This results in a marked increase in groundless and frivolous appeals motivated by delay tactics.

Such a trend towards filing frivolous appeals would inundate our court system. The effect of which would surely militate against our Chief Justice's correct and creditable efforts to overcome the backlog of pre-2000 cases as well as to drastically reduce the number of appeals to the Court of Appeal, which now stands at 7,385 (according to a report in New Straits Times dated 4 June 2004) – with probably about 40 fresh appeals being filed per day from about 65 High Courts in East and West Malaysia. I am also convinced that we are on the right track to focus on pre-2000 cases despite some adverse comments from some senior lawyers as, besides, *inter alia*, the need for sound professional competency and high integrity of our judges, the speed of disposal of our very old cases would determine the volume of our foreign direct investments that flow into our economy. In this inexorable march towards the new millennium of a globalised world it is an absolute *sine qua non* for the survival of a nation that competency, transparency and meritocracy should take hold willy-nilly; one could almost sense this trend palpably. The Chief Justice's positive plan of action could be liken to walking on two legs: by firstly, amending s. 68 of the Courts of Judicature Act to curb the number of appeals coupled with the redefinition and implementation of the specialness of the special circumstances test, and secondly, a proactive work-effort towards clearing the backlog. The ratio in *Kosma* is binding on all courts other than the Federal Court. In my opinion *Kosma* may have to be revisited by another panel of the Federal Court with a view to reinstate the ratio in *Serangoon Garden*. This would also afford an opportunity to our apex court to reaffirm: (a) the trite principles pertaining to the specialness of the special circumstances; (b) the unlimited factors that may constitute special circumstances, due firstly, to the discretionary nature of the exercise, and secondly, the fact that execution is a proceeding where the court's power and supervision is implored; and, (c) that arguable merits of the applicant's appeal is a factor to be considered on a *prima facie* basis in determining special circumstances. On this point, I do not think I need to restate what I have set out above save to quote from a well expressed passage in the judgment of Ian Chin J in *Yun Hing (Sabah) Sdn Bhd v. Sandakan Plywood & Veneers Co Sdn Bhd* [1995] 2 CLJ 665 *(Yun Hing)* (at p. 670 at G):

> … I am of the view that *Mong v. Bartram* [1891] 1 QB 346 never decided that the merit of the appeal cannot be a relevant consideration but the case merely decides that the merit of an appeal is, by itself, not enough to constitute special circumstances. *If the merit or demerit of an appeal is not a relevant consideration, you may find that a party may be successful in establishing special circumstances and thus obtain a stay when his appeal is devoid of merits; such a result is surely undesirable and surely is not what society approve of.* It is not insignificant that in *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1976] 1 MLJ 131 at p 132, the Federal Court there speaks in these terms, *viz*:
>
> > However, an allegation on an appeal that there has been misdirection at the trial would not be sufficient to bring it within the special circumstances: *Mong v. Bartram.*
>
> Similarly, the case of *Lee Kuan Yew v. Jeyaretnam JB* [1991] 1 MLJ 83, at p 85, also speaks in a similar vein, *viz* 'However, the fact that there may be strong grounds for an appeal is not by itself a reason for granting a stay'.
>
> Both these cases talk about insufficiency rather that it being totally irrelevant, the merit of an appeal being a factor bringing it within the meaning of special circumstances. Hence, I am of the view that the merit of an appeal though on its own may not be sufficient to constitute special circumstances, may be taken into consideration with other factors for the purpose of determining whether there are special circumstances. (emphasis added)

With respect, it is the approach in *Yun Hing* that reveals an uncommon ability of a judge who could, while determining an issue before him, sit back to take a breather from legalese or strict legalism and look at the larger picture of the court's abiding duty to administer the practical essence of justice in such cases. (See also *Deputy Commissioner of Taxation (Vic) v. Trevaskis* [1984] ATR 867 and *Deputy Federal Commissioner of Taxation v. Brewer* [1987] ATC 4560.)

Surely, there is enough material in the form of cause papers (even without a written judgment) before the court hearing the stay application to decide, on a *prima facie* basis, whether there are arguable merits of the appeal or each party's case. This is similar to the task undertaken by an SAR or judge in a summary application (of course prior to trial) to determine on a *prima facie* basis whether there are triable issues in that claim or defence based on the cause papers. The view that merits of the appeal is wholly irrelevant would bring about the undesirable situation of a double-edged sword, where if a stay-applicant's appeal is truly grounded upon strong grounds he would be shut out from ventilating them, whereas if his appeal is hopelessly doomed to fail the respondent is also debarred from raising even a whimper as regards such merits. If it be the former position the cause of justice is defeated, and if the latter,

the court's judicial time would be wasted. The latter position would result in a mounting backlog of appeals in the courts, particularly in the Court of Appeal and the fruits of litigation would be unjustly withheld from the respondent for a considerable period of time. We must be mindful that the law is not cast in stone but is a living and breathing creature of man, ever responsive to the needs of society.

Unless the law on stay of execution is soon resolved, and the current state of flux on the issue put right, it threatens to generate a robust controversy and debate a la the likes of the great divide on the standard of proof test in criminal cases some years ago (see *Arulpragasan Sandaraju v. PP* [1996] 4 CLJ 597 *(Arulpragasan)*). Meanwhile, in recent stay applications before me, lawyers seem to indulge in a mantric repetition of the words 'special circumstances' but avoid going into the essential ingredients to establish special circumstances. Unfortunately, I found myself in the thick of that controversy during my tour of duty in Penang – promptly continued during my 'extended sabbatical' in the tranquility of Perlis; though no doubt it permitted me to recharge my analytical batteries. (See *PP v. Goh Kim Looi* [1994] 2 CLJ 809; *Kamaraguru a/l N. Muniandi & 2 Ors v. PP* [1994] 2 CLJ 53, as cited in *Tan Boon Kean v. PP* [1995] 4 CLJ 456; *PP v. Ong Cheng Heong* [1998] 4 CLJ 209; and *PP v. Saare Hama & Anor* [2001] 4 CLJ 475.) The very long established standard of proof was disturbed in *Arulpragasan*, which virtually impinged upon the validity of hundreds of decisions of our courts at various levels, and Parliament was driven to amend s. 180 of the Criminal Procedure Code. I had expressed the view that the phrase 'maximum evaluation of evidence' in *Arulpragasan* simply means careful evaluation of every ingredient necessary to prove the offence. And, that it is impermissible to use two different dictionaries at two different stages in a trial to resolve the meaning of the same hackneyed phrase in criminal jurisprudence 'beyond reasonable doubt'.

The Case At Hand

I shall now turn to the current application by the defendant for stay before me. The defendant's appeal has afforded confirmation of my initial tentative suspicion that the defendant's intention in resisting the plaintiff's claim is only to delay the plaintiff's recovery of the huge debt due. There are two potent reasons for this. On the nugatory point, besides bare assertions, the defendant did not condescend upon any particulars as to how they could not be restored to their original position if they succeed in their appeal. The reason is obvious. The plaintiff is a reputable bank with sound financial and property backing.

Be that as it may, just for completeness I would take the liberty to indulge, albeit briefly, in my nostalgia for *Serangoon Garden*, and I shall now consider whether the defendant's appeal to the Court of Appeal is clothed with any arguable merits. At the forefront of my mind is that arguable merits need only be shown on a *prima facie* basis and the defendants need not satisfy this court that their appeal is bound to succeed.

The defendant's counterclaim is based on the earlier three overridden credit facilities RCF1, RCF2 and RCF3 in which the defendant alleged that the plaintiff had orally agreed to charge only 1% interest differential between the fixed deposit numbers FD1, FD2 and FD3 and the plaintiff's 'cost of fund' in respect of the said earlier three credit facilities respectively. Indeed, their counsel had conceded that these three facilities were, by agreement between the parties, replaced with revolving credit facility 'RCF4'. And, that it was exclusively in respect of credit facility 'RCF4' that the plaintiff's current claim was based. The counterclaim based on the three overridden and defunct credit facilities appears to rest on very weak foundations as whatever issues if any in respect of RCF1 to 3 have been regularised by RCF4. In the appeal before me against the learned senior assistant registrar's decision, I found it appropriate under the circumstances to allow the plaintiff to enter judgment only on the capital sum of RM22,000,000, which was indeed not at all disputed by the defendant, as confirmed by their counsel, Cik Norasma bt Che Din before me on 16 October 2003. The dispute in the claim was only in respect of the variation and basis of calculation of the 'Banks Margin of Interest imposed above the Bank's Cost of Funds' interests on RCF4. It could thus be readily seen that the appeal to the Court of Appeal against the decision on the plaintiff's claim is wholly devoid of any arguable merits.

As no other grounds that would constitute special circumstances for a stay was canvassed by counsel for the defendant before me, I dismissed the application. Immediately after my decision, the defendant applied to the Court of Appeal for stay of execution, and my secretary received a note from the Court of Appeal registry that a stay was indeed granted; perhaps, on the basis of some other fresh special circumstances not raised by counsel before me.